IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GAIL LEIGHTON and ROBERT LEIGHTON, wife and husband, and the marital community composed thereof, Appellants, v. UROLOGY NORTHWEST, P.S., KARNY JACOBY, M.D. and JOHN DOE JACOBY, wife and husband, and the marital community composed thereof, WALLINGFORD FAMILY PRACTICE, P.S., LINDA J. CLARK M.D. and TIM STEARNS, wife and husband and the marital community composed thereof, Respondents.	)	No. 56642-3-I DIVISION ONE UNPUBLISHED OPINION FILED: August 21, 2006

AGID, J. – Gail Leighton appeals the trial court's summary judgment order dismissing her medical negligence and informed consent claims against Dr. Karny Jacoby. She argues that the medical records attached to her expert's original declaration sufficiently support his conclusion in the declaration itself that Dr. Jacoby breached the standard of care and caused her injury and damages. Failing that, she contends the expert's detailed second declaration required the trial court to grant her motion for reconsideration.

It is the medical expert's role, not the court's, to identify which acts or omissions he or she believes violated the standard of care and explain why the defendant physician breached the standard. Here, the medical records themselves do not clearly establish which of Dr. Jacoby's acts or omissions the expert believes fell below the standard of care, nor do they give any indication why he reached that conclusion. Further, the second declaration was based on evidence available well before the expert made his original declaration, and Leighton's trial counsel never offered a good reason why the original declaration did not contain that detailed information. It was not newly discovered evidence, and the trial court was not required to consider it. While we sympathize with Ms. Leighton, there is no basis on which to reverse the trial court.

FACTS

In 1997, Gail Leighton contacted her primary care physician, Dr. Linda Clark, complaining of bladder problems. Dr. Clark diagnosed the problem as anatomical and in January 1998, she referred Leighton to Dr. Karny Jacoby, a member of the Urology Northwest, P.S., practice group, for a urologic consultation. On January 28, Dr. Jacoby examined Leighton and made the following assessment:

> Significant pelvic prolapse with grade IV cystocele, high rectocele, and possibility of vault prolapse without incontinence. Reviewed options utilizing detailed anatomical drawings. Discussed options of pessary versus reconstructive surgery. Patient is interested in reconstructive surgery. Reviewed risks and complications of surgery, as well as expected outcomes. . . .[1]

On February 23, Leighton had a pre-operation appointment with Dr. Jacoby at which

[1] A cystocele is a hernia of the bladder, typically the urinary bladder. Webster's Third New International Dictionary at 567 (1993). A rectocele is a "bulging of the rectum into the vagina." Id. at 1899.

they reviewed the planned surgery and the risks and complications again, and Leighton signed informed consent documents. Dr. Jacoby performed surgery on March 2, 1998, including a "Raz four corner bladder neck suspension, cystocele, rectocele and perineal repair, sacrospinous ligament fixation, [and] cystoscopy." She completed an operation procedure report shortly after the surgery.

Following the surgery, Leighton experienced stress urinary incontinence and pain during intercourse. During a follow-up visit on April 8, 1998, Dr. Jacoby noted that Leighton was recovering well but was concerned about her incontinence problems. Dr. Clark referred Leighton to Dr. James P. Gasparich, who examined Leighton on June 15, 1998, and found a small cystocele and some foreshortening of the vagina. Leighton then sought out Dr. Roger C. Andersen of the Women's Urology Center, who first examined her on July 16, 1998. Leighton complained that she had loss of urine when she coughed or bent over, intercourse remained painful, and it felt like there was a barrier near the entrance of her vagina. Dr. Andersen found that Leighton's vagina had been shortened and that rectocele repair may be necessary.

Dr. Andersen performed surgery on Leighton on October 9, 1998, to address her continuing incontinence and painful intercourse problems. He stated in an operative note that Leighton

> had considerable defects to the posterior vaginal floor with several bands of tissue being tight across the floor which were very tender to palpation with this patient. It appeared that possibly excess vaginal mucosa had been trimmed away as well as sutures being placed too lateral. The plan was to dissect these free in the hopes that she could have normal intercourse. Also, following the previous surgery, she became incontinent, having never suffered from this before and we are therefore doing a sling at this time to correct the incontinence.

This surgery did not resolve all of Leighton's problems, so Dr. Andersen operated again on April 16, 1999. On May 4, 1999, at Leighton's request, Dr. Andersen sent a letter to Dr. Clark summarizing his care of Leighton. He discussed his review of Leighton's March 1998 surgery, noting that apparently there was no "urodynamic evaluation done pre-operatively[,]" and stating that

> [d]ue to missing details in the operative report certain aspects of the surgery were unclear to me. It does appear the bladder was purposefully sutured to the fascia and the levator plate, which is rather unusual for this repair. No preop mention is made of what is described in the op note as a large rectocele. A sacrospinous ligament suspension is mentioned although there is no clarification as to what side or if it was bilateral nor the exact technique used. Vaginal mucosa was trimmed out anteriorly and posteriorly. No mention is made as to how the caliber or length of the vaginal vault was evaluated.

On February 21, 2001, Leighton filed a complaint against Dr. Jacoby and Urology NW, and Dr. Clark and Wallingford Family Practice, alleging negligence and failure to obtain her informed consent. On September 21, 2001, the trial court granted Dr. Clark's and Wallingford Family Practice's summary judgment motion and dismissed Leighton's claims against them, leaving only her claims against Dr. Jacoby and Urology NW. Over the next two years the discovery process became increasingly contentious, with the parties having difficulty agreeing on deposition dates and each party wanting to depose the other's witnesses first.[2]

On March 6, 2003, Leighton moved to compel discovery and Dr. Jacoby's attendance at a March 13 deposition. But before the court considered Leighton's

[2] There were numerous discovery problems, foremost among them the failure to agree on deposition dates and order. The record indicates both parties made various discovery requests that were either ignored or disputed by the other. For instance, Leighton's attorney unilaterally noted several depositions at which Dr. Jacoby did not appear, and Dr. Jacoby's attorney expressed frustration at Leighton's noting depositions without her agreement.

motion, an Order of Rehabilitation and Appointment of Receiver was entered against Dr. Jacoby's medical malpractice insurer, Washington Casualty Company (WCC), in an unrelated case, requiring a stay of all proceedings in which WCC was a party or was obligated to defend. In May 2003, the trial court stayed Leighton's case pending the outcome of WCC's receivership proceedings. In the fall of 2004, the court set a trial date of November 14, 2005. Discovery problems continued where they had left off, and the relationship between the parties' attorneys remained acrimonious.

On May 25, 2005, Dr. Jacoby moved for summary judgment, arguing Leighton did not have expert testimony showing that she had deviated from the standard of care, caused Leighton's injury, or failed to obtain informed consent. The trial court set a hearing for June 30, 2005. On June 17, Leighton filed several documents in opposition to Dr. Jacoby's summary judgment motion, including Dr. Andersen's declaration. Andersen said he had reviewed all of Leighton's medical records related to her surgery, and he made the following statements:

> 6. I am familiar with the proper medical treatment for Mrs. Leighton's conditions under the medical standards of care that are expected of reasonably prudent physicians under the same or similar circumstances related to Mrs. Leighton's medical care and treatment rendered by Dr. Jacoby.
>
> 7. The acts or omissions by Karny Jacoby, MD, related to her surgery on Gail Leighton on March 2, 1998, in my opinion, were negligent because her medical care and treatment breached the medical standards of practice by failing to exercise that degree of care, skill and learning for a reasonably prudent medical physician, under the same or similar circumstances, and as a result caused Gail Leighton to suffer injuries.

He attached several medical records to his declaration, including Leighton's initial history, physical and intake form, operative reports for the two surgeries he performed,

and his letter to Dr. Clark summarizing his care of Leighton.

In her brief opposing Dr. Jacoby's summary judgment motion, Leighton asked the court to either compel Dr. Jacoby's appearance at a deposition or grant summary judgment for Leighton. On June 24, Leighton filed a formal motion to compel Dr. Jacoby's deposition within 15 days and award terms and sanctions for her refusal to comply with discovery rules. She also filed a motion to shorten the time for hearing her motion to compel, so it would be heard before the hearing on Dr. Jacoby's summary judgment motion. The trial court denied the motion to shorten time.

At the July 30 summary judgment hearing, the court declined to hear argument on Leighton's discovery request, ruling that it was not related to the summary judgment motion.[3] Dr. Jacoby argued that Dr. Andersen's declaration was insufficient to defeat summary judgment because he did not cite specific facts to support his conclusion that she was negligent, and he said nothing about informed consent. Speaking about Dr. Andersen's declaration, Leighton's attorney said

> I'll apologize in advance to the Court, there is a paragraph missing, [Andersen] is in Canada, and when I got back and saw what had come in, I don't know what happened, but we missed a paragraph. So there should be one more paragraph in this declaration, but it is not there, so that is a problem that I get to deal with. . . .

The trial court stated that Dr. Andersen's declaration failed to establish "any link between any alleged acts or omissions, and his conclusion that is reflected in Paragraph 7, that the acts or omissions by Dr. Jacoby were negligent." Leighton's attorney admitted that the "link" paragraph was the one that was missing. He moved for

[3] Nor did the court consider Leighton's request for summary judgment because there was no motion properly and timely noted before the court.

a one month continuance under CR 56(f) to depose Dr. Jacoby. The trial court denied Leighton's motion for a continuance, granted Dr. Jacoby's summary judgment motion, and dismissed Leighton's claims.

On July 11, 2005, Leighton filed her motion for reconsideration and also asked the court to rule on her motion to compel discovery. She submitted a second, far more detailed declaration from Dr. Andersen in which he discussed the procedures and methods Dr. Jacoby used that he believes breached medical standards of care and treatment and ultimately caused harm to Leighton. He also stated that the records did not show that Dr. Jacoby ever obtained Leighton's consent to shorten her vagina as part of the operation. On August 3, 2005, the trial court denied both Leighton's motion for reconsideration and her motion to compel discovery. On August 23, the parties stipulated to an order dismissing Leighton's claims against Urology NW with prejudice.

DISCUSSION

I. Motion to Compel Discovery

Leighton argues the trial court abused its discretion by denying her motion to shorten time for hearing on her motion to compel discovery and by ultimately denying her motion to compel.[4] The trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasoning.[5] The trial court

[4] This court reviews orders denying motions to shorten time and to compel discovery for abuse of discretion. State ex rel. Citizens v. Murphy, 151 Wn.2d 226, 236, 88 P.3d 375 (2004) (reviewing order on motion to shorten time for hearing) (citing Loveless v. Yantis, 82 Wn.2d 754, 759, 513 P.2d 1023 (1973)); Hertog v. City of Seattle, 88 Wn. App. 41, 47, 943 P.2d 1153 (1997) (reviewing order on motion to compel discovery) (citing Barfield v. City of Seattle, 100 Wn.2d 878, 886-87, 676 P.2d 438 (1984)), aff'd, 138 Wn.2d 265, 979 P.2d 400 (1999).

[5] Beltran v. Dep't of Soc. & Health Servs., 98 Wn. App. 245, 256, 989 P.2d 604 (1999) (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

"has considerable latitude in managing its court schedule to ensure the orderly and expeditious disposition of cases."[6]

Leighton argues that the trial court rewarded Dr. Jacoby's obstructionist behavior by ruling on the summary judgment motion without first compelling discovery. She contends it was unfair that she never got to take Dr. Jacoby's deposition and fully test Dr. Jacoby's evidence. Dr. Jacoby argues Leighton never claimed or showed that the requested discovery was necessary to respond to the summary judgment motion.

Leighton argued below that the trial court should grant her motions to compel and shorten time because Dr. Jacoby had repeatedly thwarted her discovery attempts and provided incomplete answers to interrogatories. While these may be reasons to grant the motion to compel, she never asserted the requested discovery was necessary to respond to Dr. Jacoby's summary judgment motion. Thus, the trial court had no reason to hear the motion to compel before or in conjunction with the hearing on the summary judgment motion. For this reason alone, the trial court did not abuse its discretion by denying the motion to shorten time.

In her reply brief on appeal, Leighton states that Dr. Jacoby's refusal to comply with discovery requests meant she was "unable to obtain evidence to oppose [Dr. Jacoby's] motion for summary judgment and to provide [Dr. Andersen] with as much evidence as possible upon which to base his opinion." Even if we ignored the fact that Leighton did not make this argument below,[7] she fails to explain why this discovery was

[6] Idahosa v. King County, 113 Wn. App. 930, 937, 55 P.3d 657 (2002), review denied, 149 Wn.2d 1011 (2003).

[7] We may refuse to review any issue not raised in the trial court. RAP 2.5(a); Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844 (2005).

necessary or would have helped her to defeat summary judgment. It was Dr. Andersen's insufficient original declaration that prevented her from defeating the summary judgment motion. In fact, Dr. Andersen, who was one of Leighton's treating physicians, never claimed he needed Dr. Jacoby's deposition or interrogatory answers to form an opinion on negligence and informed consent. Indeed, he made his second declaration, which was sufficient to defeat summary judgment if allowed into evidence, without any additional discovery. Once the trial court granted summary judgment and dismissed Leighton's claims, her motion to compel became moot.

The trial court properly denied Leighton's motions to shorten time and compel discovery because they were not relevant to its decision on Dr. Jacoby's motion for summary judgment.

II. Motion for Continuance

Leighton argues the trial court erred by denying her motion for a continuance under CR 56(f). We review orders denying CR 56(f) motions for abuse of discretion.[8]

CR 56(f) states:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Leighton argues that she needed a continuance in order to obtain the "missing" paragraph from Andersen's declaration and to secure Dr. Jacoby's compliance with discovery requests. Dr. Jacoby argues that Leighton never told the trial court she

[8] Tellevik v. 31641 W. Rutherford St., 120 Wn.2d 68, 90, 838 P.2d 111 (1992) (citing Coggle v. Snow, 56 Wn. App. 499, 504, 784 P.2d 554 (1990)).

needed further discovery to respond to the summary judgment motion, and she never said she needed the continuance to obtain Dr. Andersen's complete declaration. She also points out that Leighton never provided an explanation for why the paragraph was missing in the first place.

A court may deny a motion for a continuance when "'(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.'"[9] In Tellevik v. 31641 W. Rutherford St., plaintiffs moved for a CR 56(f) continuance in a hearing on defendant's summary judgment motion.[10] They established that they could not obtain information they needed to defeat the defendant's summary judgment motion because defendant's counsel did not respond to production requests.[11] They set forth the specific facts they hoped to obtain through further discovery that would defeat the summary judgment motion. The Washington Supreme Court held the trial court abused its discretion in not granting the motion for a continuance.[12]

Leighton's trial counsel told the trial court a continuance was necessary because "there is a motion pending before you next week, to compel Dr. Jacoby to attend a deposition, and if [defendants] want to take . . . Andersen's deposition . . . and then you will have a complete record in front of you, you can make a legal and a medical factual

[9] Id. (quoting Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989)).
[10] 120 Wn.2d 68, 838 P.2d 111 (1992).
[11] Further, the location of confidential information was not known until shortly before the summary judgment hearing. Id. at 91.
[12] Id.

decision on summary judgment." He never said he needed the continuance to find the "missing" paragraph in Dr. Andersen's declaration. Even if this was a basis for the motion, he never said so, and he gave no reason why the paragraph was missing.[13] Instead, he merely acknowledged that the essential portion of the declaration was missing and that it was a "problem [he] had to deal with."

Further, even if Dr. Jacoby did not cooperate with previous discovery requests, Leighton, unlike the Tellevik plaintiffs, did not set forth the specific facts she sought to obtain through further discovery that would defeat summary judgment. Indeed, she already had the evidence necessary to defeat summary judgment, the same evidence her trial counsel said was missing. The trial court did not abuse its discretion by denying Leighton's motion for a continuance.

III. Summary Judgment

Leighton argues the trial court erred when it granted Dr. Jacoby's summary judgment motion. We review summary judgments de novo, performing the same inquiry as the trial court.[14] Summary judgment is proper only when there is no genuine issue about any material fact, and the moving party is entitled to a judgment as a matter of law.[15] We consider all facts and reasonable inferences in the light most favorable to the nonmoving party.[16] A nonmoving party "may not rely on speculation, argumentative

[13] Id. at 90. On appeal, Leighton states that the most plausible explanation for the "missing" paragraph "is that someone involved in the drafting and transmittal of the declaration to Dr. Anders[e]n simply inadvertently omitted the paragraph linking Dr. Jacoby's acts and omissions to Dr. Anders[e]n's conclusions as to negligence and causation." Even if this is what happened, it is not a "good reason" for the delay in obtaining the desired evidence.

[14] Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

[15] CR 56(c).

[16] Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

assertions that unresolved factual issues remain, or on affidavits considered at face value."[17] Affidavits consisting of conclusory statements without sufficient factual support will not defeat a summary judgment motion.[18]

Rather than establishing through affidavits that no material factual issue exists, a moving defendant may meet his or her initial burden by showing "the trial court that the plaintiff lacks competent evidence to support an essential element of his or her case."[19] When the defendant chooses this approach, there is no need to set forth specific facts because a complete failure of proof about an essential element of the plaintiff's claim necessarily makes all other facts irrelevant.[20] If a moving defendant meets his or her initial burden, the inquiry shifts to the plaintiff.[21] If the plaintiff does not establish the existence of an essential element on which she will bear the burden of proof at trial, the trial court should grant the motion.[22]

Dr. Jacoby met her initial burden by showing that Leighton did not have expert testimony about negligence or informed consent. The burden then shifted to Leighton, who countered by filing Dr. Andersen's declaration. Leighton does not argue that the original declaration itself was sufficient. Rather, she asserts the declaration read together with the attached medical records sets forth specific facts showing that Dr.

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[17] Meyer v. Univ. of Wash., 105 Wn.2d 847, 852, 719 P.2d 98 (1986); see also CR 56(e).

[18] CR 56(e); Guile v. Ballard Cmty. Hosp., 70 Wn. App. 18, 25, 851 P.2d 689 (1993) (citing CR 56(e); Ruffer v. St. Frances Cabrini Hosp., 56 Wn. App. 625, 628, 784 P.2d 1288, review denied, 114 Wn.2d 1023 (1990); Vant Leven v. Kretzler, 56 Wn. App. 349, 356, 783 P.2d 611 (1989)), review denied sub nom. Guile v. Crealock, 122 Wn.2d 1010 (1993).

[19] Guile, 70 Wn. App. at 23 (citing Young v. Key Pharms., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989)).

[20] Id. (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

[21] Young, 112 Wn.2d at 225.

[22] Id. (citing Celotex, 477 U.S. at 322).

Jacoby was negligent and failed to obtain her informed consent.

Under the doctrine of informed consent, a doctor must inform the patient of the material facts, including the attendant risks, for a given treatment before obtaining the patient's consent to treatment.[23] The doctor need only explain risks of a material nature.[24] The determination of materiality consists of a two-prong test, and expert testimony is required to prove the first prong: the existence and nature of the risk and the likelihood that it will happen.[25] Dr. Andersen did not even mention informed consent, let alone discuss risks, in his original declaration, so it was insufficient on its face to defeat summary judgment on Leighton's informed consent claim.

To prevail on her negligence claim, Leighton must demonstrate that her injury "resulted from the failure of a health care provider to follow the accepted standard of care."[26] Specifically, she must prove

> (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;
> (2) Such failure was a proximate cause of the injury complained of.[27]

Expert testimony is typically required to establish the standard of care and prove

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[23] Adams v. Richland Clinic, Inc., P.S., 37 Wn. App. 650, 656, 681 P.2d 1305 (1984) (citing Smith v. Shannon, 100 Wn.2d 26, 29, 666 P.2d 351 (1983)); see generally RCW 7.70.050.

[24] Adams, 37 Wn. App. at 656.

[25] Id. at 657-58 (citing Smith, 100 Wn.2d at 33-34). "Just as patients require disclosure of risks by their physicians to give an informed consent, a trier of fact requires description of risks by an expert to make an informed decision." Smith, 100 Wn.2d at 33-34. The second prong of materiality, usually left to the trier of fact, is whether the probability of the harm at issue is a risk a reasonable patient would consider in deciding on treatment. Adams, 37 Wn. App. at 658 (citing Smith, 100 Wn.2d at 33).

[26] RCW 7.70.030(1).

[27] RCW 7.70.040.

causation.[28] A medical expert must base his or her testimony on a reasonable degree of medical certainty.[29] A medical malpractice plaintiff can defeat a summary judgment motion by presenting expert testimony that raises material issues of fact about the defendant's compliance with the standard of care and causation.[30] The question here is whether the medical records attached to Dr. Andersen's first declaration provide adequate factual support for the conclusions he included in the declaration itself.

In Guile v. Ballard Community Hospital, Guile sued a doctor and hospital for medical malpractice after her surgery for urologic problems similar to those Leighton experienced.[31] Guile submitted Dr. Sherman W. Meyer's affidavit in response to defendants' summary judgment motion. In his affidavit, Dr. Meyer summarized his qualifications, stated that he reviewed hospital records, and provided the following opinion:

> "Mrs. Guile suffered an unusual amount of post-operative pain, developed a painful perineal abscess, and was then unable to engage in coitus because her vagina was closed too tight. All of this was caused by faulty technique on the part of the first surgeon, Dr. Crealock. In my opinion he failed to exercise that degree of care, skill, and learning expected of a reasonably prudent surgeon at that time in the State of Washington, acting in the same or similar circumstances."[32]

We held that Dr. Meyer's affidavit was insufficient to defeat summary judgment because it was "merely a summarization of Guile's postsurgical complications, coupled with the unsupported conclusion that the complications were caused by Crealock's 'faulty

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[28] Guile, 70 Wn. App. at 25 (citing Harris v. Robert C. Groth, M.D., Inc., 99 Wn.2d 438, 449, 663 P.2d 113 (1983)).

[29] McLaughlin v. Cooke, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989).

[30] See Coggle, 56 Wn. App. at 510-11.

[31] 70 Wn. App. 18, 23, 851 P.2d 689, review denied sub nom. Guile v. Crealock, 122 Wn.2d 1010 (1993).

[32] Id. at 26.

technique.' It does little more than reiterate the claims made in Guile's complaint."[33]

In Morton v. McFall, Morton sued Dr. Joseph for negligence after he recommended surgery to diagnose lung cancer before getting the results of a tuberculosis test.[34] Dr. Joseph moved for summary judgment, arguing Morton did not have medical expert testimony to support her claim. In response, Morton submitted the declaration of Dr. Cynthia Rasch, an internist familiar with the standard of care for assessing and diagnosing pulmonary problems. In paragraph four of her declaration, Dr. Rasch stated that she had reviewed Morton's medical records and determined that, "for the reasons outlined below," Dr. Joseph breached the standard of care for the situation, causing harm to Morton.[35] In paragraphs five and six she provided her reasons:

> 5.) My conclusion is based upon the fact that [Dr. Joseph] did not obtain the results of the sputum test prior to recommending . . . surgery on the Plaintiff. As noted in Dr. Joseph's chart on July 13, 2000, if he had known that the sputum test was positive for TB the surgery could have been avoided. It is clear from the ER Report of May 12, 2000, that a sputum culture was performed. A sputum test would be included in an infectious disease workup. Likewise, a PPD [purified protein derivative], a simple skin test could help evaluate the potential for tuberculosis.
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> 6.) In the present case [Dr. Joseph] did not wait for the results of the sputum test prior to recommending . . . surgery. The results of the sputum test which the defendants received the day after the surgery are clear that surgical intervention was not necessary in this case. The bronchoscopy showed upper right lobe granulomatous inflammation with necrosis. This is a sign of chronic infection and should have been worked up. . . .
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> A thoracotomy would not have been the treatment of choice for tuberculosis. These facts support my conclusions in paragraphs 4 and 5 above.[36]

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[33] Id.
[34] 128 Wn. App. 245, 115 P.3d 1023 (2005).
[35] Id. at 250.

Dr. Joseph, citing Guile, argued that Dr. Rasch offered only conclusory assertions not based on the facts of the case. We disagreed, holding that Dr. Rasch "clearly identifie[d] the facts supporting her opinion that it was a breach of the standard of care to recommend or perform the lobectomy without first obtaining the results of the sputum test."[37]

This case is like Guile and unlike Morton. As in Guile, Dr. Andersen's declaration consisted of bare assertions insufficient to defeat summary judgment. Although he attached medical records to his declaration, unlike Dr. Rasch in Morton, he failed to identify specific facts from those records which support his conclusion that Dr. Jacoby breached the standard of care. In Morton, the court did not have to search the medical records to find factual support for Dr. Rasch's conclusions. Here, we not only have to search the medical records to attempt to determine precisely which of Dr. Jacoby's acts and omissions Dr. Andersen believes violated the standard of care, we also have to search those records in an attempt to discern why Dr. Andersen believes those acts and omissions violated the standard of care. We require expert medical testimony to provide those answers because the court should not, and usually cannot, connect the dots.

Moreover, Dr. Andersen does not explicitly state anywhere in the attached records which of Dr. Jacoby's acts or omissions was actually improper so that we could infer that he thought they violated the standard of care. The closest he comes is when he says in his letter to Dr. Clark that Dr. Jacoby's suturing of Leighton's bladder to the

[36] Id. at 250-51 (second alteration in original).
[37] Id. at 255.

fascia and levator plate was "rather unusual for this repair." Most of the information in the records is limited to recitations of Leighton's medical history, symptoms, surgical procedures, and post-surgical complications. Dr. Andersen's handwritten notes use shorthand we cannot translate to discuss technical medical terms. If Dr. Andersen had stated in the medical records which procedures were improper and why, this may have been a different case. But the records do not contain anything that definitive.

Leighton relies on Dr. Andersen's operative note from her October 1998 surgery and his May 1999 letter to Dr. Clark. But neither of these documents sets out acts and omissions in a manner that clearly indicates Dr. Andersen believed they violated the standard of care. Even if we could discern which acts and omissions Dr. Andersen believed violated the standard of care, he says nothing about *why* they were below the standard. In other words, he failed to provide any facts supporting his opinion that those unspecified acts and omissions breached the standard of care.[38] This is unlike Morton, where Dr. Rasch stated Dr. Joseph breached the standard of care by recommending the lobectomy without first obtaining results of the sputum test *because* Dr. Joseph's own chart noted that surgery could have been avoided had he known the sputum test was positive for TB.[39] Here, even if we presumed Dr. Andersen concluded Dr. Jacoby breached the standard of care by shortening Leighton's vagina and her method of suture, he does not identify any facts supporting his opinion.

While it is truly unfortunate that Dr. Andersen's original declaration was "missing" the vital "link," it is insufficient to create an inference in favor of Leighton on

[38] See Morton, 128 Wn. App. at 255.
[39] Id. at 250 (emphasis added).

the elements of duty and breach. The trial court did not err by granting Dr. Jacoby's summary judgment motion.

IV. Motion for Reconsideration

Leighton argues the trial court abused its discretion by denying her motion for reconsideration. We review the trial court's decisions to deny a motion for reconsideration and refuse to consider additional evidence for an abuse of discretion.[40] She maintains Dr. Andersen's second declaration, submitted with her motion for reconsideration, created genuine issues of fact about whether Dr. Jacoby was negligent and failed to obtain her informed consent. Dr. Jacoby does not dispute this. Instead, she argues Leighton merely filled in the deficiencies in Dr. Andersen's first declaration with information that was not newly discovered evidence and could have been included in his first declaration.

While the trial court did not explicitly state whether it considered Dr. Andersen's second declaration in support of Leighton's motion for reconsideration, we can only presume it did not. Dr. Andersen's second declaration clearly establishes genuine issues of fact about standard of care, causation, damages, and informed consent which would defeat Dr. Jacoby's summary judgment motion. The question is whether the trial court had to consider Dr. Andersen's second declaration.

With summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration.[41] CR 59 governs motions for

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[40] Chen v. State, 86 Wn. App. 183, 192, 937 P.2d 612, review denied, 133 Wn.2d 1020 (1997).

[41] Id. at 192 (citing Applied Indus. Materials Corp. v. Melton, 74 Wn. App. 73, 77, 872 P.2d 87 (1994)).

reconsideration, and it does not prohibit the submission of new or additional materials.[42] "'Although not encouraged, a party may submit additional evidence after a decision on summary judgment has been rendered, but before a formal order has been entered.'"[43] But the trial court cannot consider evidence that could have been discovered before it ruled.[44] CR 59 provides nine grounds on which a trial court may grant a motion for reconsideration. Leighton has never specified which ground(s) she relies on, instead stating only that Dr. Jacoby wrongly assumes Leighton moved for reconsideration based on newly discovered evidence.[45]

In Adams v. Western Host, Inc., Adams brought a negligence action after she was injured in an elevator accident.[46] In response to defendant's summary judgment motion, she filed an expert's declaration about the usual cause of the type of elevator problem involved in her accident. The trial court granted summary judgment. Adams moved for reconsideration and filed a second declaration from the same expert, which stated why it was likely there was negligence in maintaining the elevator at issue.[47] We affirmed the trial court's order denying Adams' motion for reconsideration because the expert's "testimony, as set forth in his second declaration, was available to Adams at the time [the expert's] first declaration was presented to the court. The realization that [the expert's] first declaration was insufficient does not qualify the second declaration

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[42] Id. (citing Sellsted v. Wash. Mut. Sav. Bank, 69 Wn. App. 852, 860, 851 P.2d 716, review denied, 122 Wn.2d 1018 (1993)).

[43] Melton, 74 Wn. App. at 77 (quoting Meridian Minerals Co. v. King County, 61 Wn. App. 195, 202-03, 810 P.2d 31, review denied, 117 Wn.2d 1017 (1991)).

[44] Coggle, 56 Wn. App. at 509 n.3 (citing Adams v. W. Host, Inc., 55 Wn. App. 601, 608, 779 P.2d 281 (1989); Richter v. Trimberger, 50 Wn. App. 780, 785, 750 P.2d 1279 (1988)).

[45] See CR 59(a)(4).

[46] 55 Wn. App. 601, 608, 779 P.2d 281 (1989).

[47] Id. at 604.

as newly discovered evidence."[48]

In Coggle v. Snow, Coggle brought a medical malpractice claim against Snow but was unable to produce an expert declaration in time for a hearing on Snow's summary judgment motion because Coggle had just hired a new attorney after apparently dilatory conduct by his first attorney.[49] The trial court denied Coggle's motion for a continuance and granted summary judgment for Snow. Coggle submitted an expert's declaration with his motion for reconsideration, which the trial court also denied. We first ruled that the trial court abused its discretion by denying Coggle's motion for a continuance. We then held that the court abused its discretion by denying

[48] Id. at 608.
[49] 56 Wn. App. 499, 784 P.2d 554 (1990).

the motion for reconsideration because it should have granted the continuance in the first place to allow Coggle to obtain the expert's declaration, or at least considered the declaration on reconsideration and found it raised genuine issues of material fact.[50] We distinguished Coggle from cases like Adams because the court did not permit Coggle to discover the necessary evidence before it ruled.[51]

Unlike in Coggle, the trial court here did not err by denying Leighton's motion for a continuance for the reason we have already discussed. This case is like Adams because no matter what ground she relies on for reconsideration, she ultimately submitted the second declaration because the original declaration was insufficient without the unexplained "missing" paragraph. She does not dispute that Dr. Andersen's "missing" testimony, as set forth in his second declaration, was available to her when she presented his original declaration to the court.[52] Indeed, all of the evidence in Dr. Andersen's second declaration was available well before he made his original declaration. Leighton's trial counsel apparently just discovered too late that the original declaration was "missing" the critical information to defeat Dr. Jacoby's summary judgment motion. As the trial court said, that is unfortunate, but it does not change the fact that, as in Adams, there was no good reason why the evidence was not before the

[50] Id. at 508-09.
[51] Id. at 509 n.3.
[52] Leighton's trial counsel referred to a missing "paragraph," but much more than an additional paragraph was included in Dr. Andersen's second declaration. There were seven numbered sections in his original declaration and twelve in his second declaration.

court when it granted summary judgment.

We affirm.

Azid, J.

WE CONCUR:

Dwyer, J.

Appelwick, C.J.